In The

Supreme Court of the United States

October Term, 1978

No. 77-1841

PETER TORO,

Petitioner,

—against—

BENJAMIN J. MALCOLM, as Commissioner of the Department of Corrections of the City of New York, and HARRISON J. GOLDIN, as Comptroller of the City of New York,

Respondents.

Petition For Writ of Certiorari to the Court of Appeals, State of New York

---

ROBERT RIVERS, P.C.
Attorney for Petitioner
393 Front Street
Suite 411
Hempstead, New York 11550
(516) 483-3555

TABLE OF CONTENTS

TABLE OF CASES

OPINIONS IN COURTS BELOW

Page

In The

Supreme Court of the United States

October Term, 1978

PETER TORO,

Petitioner,

—against—

BENJAMIN J. MALCOLM, as Commissioner of the Department of Corrections of the City of New York, and HARRISON J. GOLDIN, as Comptroller of the City of New York,

Respondents,

Petition for Writ of Certiorari to the Court of Appeals, State of New York.

JURISDICTIONAL STATEMENT

The opinion of the New York Court of Appeals sought to be reviewed is dated March 29, 1978. A motion for reargument is presently pending before the Court of Appeals. The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1257(3). Due to the fact that the petitioner herein prevailed on the trial court level and thus was the respondent in each of the state court appeals the constitutional issues raised by the denial of back pay to Mr. Toro were not directly reviewed, although an equal protection rationale was employed by the Court of Appeals in both the majority and dissenting opinions.

QUESTIONS PRESENTED

Does the application of Section 30 of the Public Officers Law of the State of New York denying an innocent public official back wages upon reinstatement, violate the equal protection clause of the Fourteenth Amendment of the Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment 14, United States Constitution

"***No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 30(1), Public Officers Law of the State of New York, McKinneys Consolidated Laws of New York, Book 46, Suppl. p. 31.

§ 30 Creation of Vacancies

1. Every office shall be vacant upon the happening of one of the following events before the expiration of the term thereof:

a. The death of the incumbent;

b. His resignation;

c. His removal from office;

d. His ceasing to be an inhabitant of the State, or if he be a local officer, of the political subdivision, or municipal corporation of which he is required to be a resident when chosen;

e. His conviction of a felony, or a crime involving a violation of his oath of office;

f. The entry of a judgment or order of a court of competent jurisdiction declaring him to be insane or incompetent;

g. The judgment of a court, declaring void his election or appointment, or that his office is forfeited or vacant;

h. His refusal or neglect to file his official oath or undertaking, if one is required, before or within thirty days

after the commencement of the term of office for which he is chosen, if an elective office, or if an appointive office, within thirty days after the commencement of such term; or to file a renewal understanding within the time required by law, or if no time be so specified, within thirty days after notice to him, in pursuance of law, that such undertaking is required.

The neglect or failure of any state or local officer to execute and file his oath of office and official undertaking within the time limited therefor by law, shall not create a vacancy in the office if such officer was on active duty in the armed forces of the United States and absent from the county of his residence at the time of his election or appointment, and shall take his oath of office and execute his official undertaking within thirty days after receipt of notice of his election or appointment, and provided such oath of office and official undertaking be filed within ninety days following the date it has been taken and subscribed, any inconsistent provision of law, general, special, or local to the contrary notwithstanding.

STATEMENT OF THE CASE

Petitioner, PETER TORO, was suspended from his position as a New York City Corrections Officer on August 31, 1971 as the immediate result of criminal charges brought against him. Although a subsequent letter purportedly was sent to MR. TORO notifying him that his position had been "vacated" by operation of law, no such communication was ever received by MR. TORO.

On or about March 14, 1973 petitioner was tried in Kings' County Supreme Court on charges of burglary, impersonating an officer and petty larceny. After an initial inappropriate verdict of guilty and immediately following sentencing, a certificate of reasonable doubt was obtained.

MR. TORO was exonerated of all charges on May 20, 1974 when the Appellate Division, Second Department unanimously reversed his conviction on the law and on the facts and dismissed the indictment on the grounds that the initial arrest and subsequent trial were based on an obvious and tragic case of mistaken identification.* It must be noted that the disposition on appeal was based on a clear and compelling absence of guilt or wrongdoing on the part of MR. TORO and not on a legal "technicality".

It should be noted further that the police officers who arrested MR. TORO in 1971 were suspended, the presiding justice at his trial ultimately faced criminal charges, and the chief prosecution witness was a fugitive from justice.

On June 24, 1974 petitioner was reinstated to his position as a Corrections Officer without application nor execution by him of a waiver of his right to back wages. Upon his reinstatement petitioner sought reimbursement for wages lost by him due to his suspension. The Department of Corrections denied his request and on May 8, 1975, by Order to Show Cause petitioner sought to secure his back pay pursuant to Article 5 of the Civil Service Law of New York. This application was denied on technical grounds. Thereafter, on October 14, 1975 an Article 78 proceeding was commenced on behalf of petitioner.

On May 12, 1976, after extensive litigation an order and judgment of the Supreme Court, New York County was entered directing the respondents to pay to MR. TORO his back wages, inclusive of contract raises which would have been received by him for the period from August 30, 1971 to June 24, 1974, less uniform allowances, vacation pay and any monies earned by him during said period of time.

---

*People v. Peter Toro, 44 A.D. 2d 848

After countless delays on the part of the respondents, an appeal from the decision was taken by respondents to the Appellate Division of the Supreme Court, First Department. That court, by order entered March 24, 1977 with two justices dissenting in part, modified the order and judgment of the Supreme Court by striking the decretal paragraph and substituting therefor a new decretal paragraph, providing that respondents pay petitioner his back wages, inclusive of contract raises and benefits which would have been received by him from August 30, 1971 to June 24, 1974 less, uniform allowances, vacation pay and any monies earned by him during said period of time and also less thirty days pay.

By notice of appeal dated March 24, 1977 respondents sought to appeal the order as modified to the Court of Appeals as a matter of right. By order dated May 12, 1977 said appeal was dismissed by the Court of Appeals *sua sponte* upon the ground that the order appealed from was not a final determination within the meaning of the Constitution.

Respondents then sought and were granted leave to appeal to the Court of Appeals on a certified question of law, on July 7, 1977. By decision dated March 29, 1978 the Court of Appeals modified the order of the Appellate Division to provide that petitioner was not entitled to back pay for the period after May 24, 1973.

During the course of his arrest, suspension and trial petitioner and his family suffered tremendous financial loss and emotional devastation. The courts below have unanimously recognized the hardship worked upon the TORO family by a tragic miscarriage of justice.

ARGUMENT

THE AUTOMATIC APPLICATION OF SECTION 30 OF THE PUBLIC OFFICERS LAW TO AN INNOCENT PUBLIC OFFICIAL VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

The *Toro* case presents a compelling example of the devastating effect of a wrongful conviction upon an innocent individual. While lip service has been paid throughout the long and tortuous history of this case to the obvious injustice done to the petitioner because of a tragic misfiring of the legal system, this same system unaccountably has refused to make the petitioner whole, hiding instead behind the mechanical application of Section 30 of the Public Officers' Law of the State of New York. Thus, in the case of an entirely innocent individual, the injustice rises to the level of a constitutional violation, for the automatic operation of such a statute works a denial of the right to equal protection.

The threshhold issue in an equal protection case is the nature of the classification created by the statute in question. If the statute deals with a suspect classification or a fundamental right, then it is subject to the strict scrutiny of a compelling state interest. Suspect classifications enumerated thus far include *(Loving v. Virginia,* 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010), national origin *(Hernandez v. Texas,* 347 U.S. 475, 74 S. Ct. 667, 98 L. Ed. 866); *Takahashi v. Fish and Game Comm.,* 334 U.S. 410, 68 S. Ct. 1138, 92 L. Ed. 1478) and alienage *(Matter of Griffiths,* 413 U.S. 717, 93 S. Ct. 2851, 37 L. Ed. 2d 910); *Sugarman v. Dougall,* 413 U.S. 634, 93 S. Ct. 2842). Designated fundamental interests are voting (*Dunn v. Blumstein,* 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274); *Harper v. Virginia Board of Elections,* 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169), travel *(Shapiro v. Thompson,* 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600), free speech *(Police Department of Chicago v. Mosely,* 408 U.S. 92, 92 S. Ct. 2286, 33 L. Ed. 212), procreation *(Skinner v. Oklahoma,* 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655) Absent either a suspect class or a fundamental right, the review of the statute generally

is relegated to the "rational basis" test. There is a recent trend, however, to resort to a middle ground of review by striking down statutes on equal protection grounds in spite of some showing of a rational basis on the part of the state. It is respectfully submitted that the basis for the classification established by Public Officers Law §30, as espoused by the majority of the Court of Appeals, is not rationally related to a legitimate state interest.

The majority stated:

> "Continued performance of governmental functions necessitates the existence of a point in time may be filled without concern for the possibility that at some future date a former officer's conviction may be reversed. Certainly a government agency should not be faced with the possible dilemma of having two officers for the same position."

The minority opinion, however, aptly exposes the fallacy of this argument in light of the fact that the petitioner was voluntarily reinstated by the Department of Corrections shortly after his exoneration by the Appellate Division of the State Supreme Court - Judge Fuchsberg wrote on behalf of the dissent:

> "The salutary effect on public confidence in government that flows from realization of the natural societal urge to return a falsely accused individual to his or her *status quo* ante is not to be underestimated. The moral values so endorsed far outweigh the alarms sounded by the majority. So far as any dislocation of personnel is concerned, it would hardly call for much administrative ingenuity to arrange that appointment to a post vacated by an occupant whose case is still in the appellate process be conditioned on

> the possibility of a reversal. In Toro's case the reality not only is that his position remained available but that, having been vindicated on the merits, he was welcomed back with open arms."

It can readily be seen from these portions of the majority and dissenting opinions that both employed an equal protection analysis to the review of the *Toro* case. An asserted governmental interest was balanced against the right of an innocent individual to be free from penalties or forfeitures arising out of an entirely wrongful conviction. Clearly, administrative convenience is a poor justification for the hardship worked upon Peter Toro and his family at the hands of our "criminal justice system." As this Court has stated, the essential, minimum requirement under any equal protection standard is that the "statutory classification bear some rational relationship to a legitimate state interest." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 92 S. Ct. 1400 (1972).

> "The essential inquiry...is...inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger." Id, at 173.

Although this court has never passed on the "fundamental" nature of the right asserted in the *Toro* case: namely, the right of an innocent public officer to be free from unjust forfeitures flowing from a wrongful conviction it is respectfully submitted that the rights of the innocent can be no less precious than the rights of the accused, which have been scrupulously guarded by this Court. In addition to the legion of cases upholding the constitutional rights of the accused in criminal actions, this Court has evaluated the financial hardship of a criminal defendant on equal protection grounds. In *James v. Strange*, 407 U.S. 128, 92 S. Ct. 2027 (1972) this Court rejected a purported "legitimate interest" asserted by the state of Kansas with respect to its statutory scheme for recoupment of counsel fees from indigent defendants. In spite of the State's claimed financial interest, the statute was struck down as violative of

the right to equal protection. The New York statute in question, Public Officers Law Section 30, deserves equally close scrutiny. Although the petitioner herein was not an indigent defendant, the financial impact of his wrongful conviction upon Mr. Toro and his family was devastating. As the dissent in the Court of Appeals recognized, the protection of the innocent and the right of the unjustly accused to be made whole must outweigh the protestations of administrative inconvenience put forth on behalf of the State.

The interplay of the majority and dissenting opinions as highlighted above reveal that an equal protection rationale was employed by both sides, albeit not specifically demoninated as such. The recurring theme in the *Toro* case is the quest of an unjustly accused public officer for equal treatment under the laws. Under any constitutional standard the State's so called "legitimate interest" must fail. It is therefore respectfully requested that the writ sought herein be allowed.

Respectfully submitted,

ROBERT RIVERS, P.C.
Attorney for Petitioner
393 Front Street
Suite 411
Hempstead, New York 11550
(516) 483-3555

OPINIONS IN COURTS BELOW

44 A.D.2d 848

The PEOPLE, etc., Respondent, v. Peter TORO, Appellant.

Supreme Court, Appellate Division, Second Department.
May 20, 1974.

Defendant was convicted in Supreme Court, Kings County, of burglary in the third degree, petit larceny and criminal impersonation, and he appealed. The Supreme Court, Appellate Division, Second Department, held that defendant's in-court identification had been illegally tainted by an improper out-of-court identification of defendant while he was sitting alone in a small room, and that the evidence failed to show defendant's guilt beyond a reasonable doubt.

Reversed.

1. Burglary ⇐ 41(1)
False Personation ⇐ 6
Larceny ⇐ 65

Evidence was insufficient to establish defendant's guilt of burglary in third degree, petit larceny and criminal impersonation beyond reasonable doubt.

2. Criminal Law ⇐ 339

Where out-of-court identification of defendant was improperly conducted while defendant was sitting alone in small room, such improper identification tainted later in-court identification by same witness.

Before GULOTTA, P.J., and MARTUSCELLO, LATHAM, COHALAN and BENJAMIN, J.J.

MEMORANDUM BY THE COURT.

Appeal by defendant from a judgment of the Supreme Court, Kings County, rendered May 24, 1973, convicting him of burglary in the third degree, petit larceny and criminal impersonation, upon a jury verdict, and imposing sentence.

The appeal brings up for review the propriety of the denial of a pretrial motion to suppress certain identification evidence.

Judgement reversed, on the law and the facts, and indictment dismissed.

[1] The People failed to establish defendant's guilt beyond a reasonable doubt.

Defendant was arrested and taken into custody in connection with a larceny and an impersonation of a police officer that occurred four days prior to his arrest. After a criminal complaint was formally filed against him, he was suspended from his job, which he had held for three years, as a New York City Correction Officer. He was released on his own recognizance after pleading not guilty.

At the *Wade* hearing held immediately prior to trial, the complainant, Marie Evans, almost 73 years of age and with poor vision, testified that defendant came to her apartment on a certain date, together with two other persons—a woman called Elase Glover and a man. She said defendant identified himself to her as Jose. After they left, she discovered that money was missing. Another witness related that Mrs. Evans stated the amount to be about $30.

Mrs. Evans next saw defendant at a police station, where he was sitting alone in a small room. She identified him as the man who had said his name was Jose. Later, she was told by someone that his name was Peter Toro.

The practice of exhibiting a defendant alone for the purpose of identification was condemned in Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 as being unnecessarily suggestive and in violation of due process. It thus became incumbent upon the People to establish by clear and convincing evidence that the identification was based upon visual observation by the complainant on the date of the alleged crime at her apartment and was not tainted by the illegal showup (People v. Logan, 25 N.Y.2d 184, 191, 303 N.Y.S.2d 353, 250 N.E.2d 454; People v. Ballott, 20 N.Y.2d 600, 286 N.Y.S.2d 1, 233 N.E.2d 103; People v. Velez, 43

A.D.2d 745, 350 N.Y.S.2d 724). This, on the record, the People failed to do.

[2] The motion to suppress the tainted identification should have been granted (United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149). There, the court noted (p. 229, 87 S.Ct. p. 1933):

> " 'It is a matter of common experience that, once a witness has picked out the accused at the line-up (here there was no lineup), he is not likely to go back on his word later on, so that in practice the issue of identity may * * * for all practical purposes be determined there and then, before the trial.' " (parenthetical matter supplied).

Absent the identification, the People's case rested on the testimony of Elase Glover, a self-confessed participant, whose testimony required corroboration.

It should be noted at this point that appellant had a previously unblemished record. He is an honorably discharged Viet Nam veteran. He lives in Brooklyn with his parents, a sister and a younger brother in a close-knit family relationship.

At the time of his arrest he was earning approximately $11,000 yearly. It passes belief that he would involve himself in such a senseless crime and so jeopardize his job and his future. In addition, it came out at the trial that defendant bore a striking resemblance to one Jose Nadal, who was known to Elase Glover.

Toro took the stand in his own defense and gave an hour-by-hour account of his actions on the day of the crime. He supported his assertions by proof that he was nowhere near the Evans apartment at the time of the perpetration of the crime.

According to the complainant, the intruders in her Brooklyn

apartment entered at about 2:30 P.M. and stayed for 30 to 45 minutes. Yet Toro showed by documentary evidence that he was miles away in Manhattan and at his place of employment at about 3:30 P.M. He would have needed the winged feet of Mercury or the attribute of ubiquity to have been in the two places at almost the same moment.

The time element itself was enough to raise a reasonable doubt and this, coupled with the tainted identification, requires that the judgment of conviction be reversed and the indictment dismissed.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 24, 1977.

Present—Hon. Harold A. Stevens, Presiding Justice,
Francis T. Murphy, Jr.,
Harold Birns,
Samuel J. Silverman,
J. Robert Lynch, Justices

In the Matter of the Application of
Peter Toro,

Petitioner-Respondent,

—against—

4193

Benjamin J. Malcolm, as Commissioner of the Department of Correction of the City of New York, and Harrison J. Goldin, as Comptroller of the City of New York,

Respondents-Appellants.

An appeal having been taken to this Court by the respondents-appellants from an order and judgment (one paper) of the Supreme Court, New York County (Kirschenbaum, J.), entered on May 12, 1976, granting the application to the extent of directing respondents to pay petitioner back pay, inclusive of contract raises and benefits which would have been received by petitioner during the period from August 30, 1971 to June 24, 1974, less uniform allowances, vacation pay and any monies earned by him during said period of time; and said appeal having been argued by Mr. Irving Cohen of counsel for the appellants, and by Mr. Robert Rivers of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is ordered that the order and judgment (one paper) so appealed from be and the same is hereby modified, on the law, without costs and without disbursements, to strike the decretal paragraph therein and to substitute the following decretal paragraph:

> "ORDERED AND ADJUDGED, that the application be granted to the extent of directing respondents to pay petitioner back pay, inclusive of contract raises and benefits which would have been received by petitioner during the period from August 30, 1971 to June 24, 1974, less uniform allowances, vacation pay and any monies earned by him during said period of time, and also less 30 days pay."

ENTER:

JOSEPH J. LUCCHI
Clerk

Stevens, P.J., Murphy, Birns, Silverman, Lynch, JJ.

4193 In re Application of Peter Toro,
Petitioner-Respondent. R. Rivers

—against—

Benjamin J. Malcolm, etc., et ano.,
Respondents-Appellants. I. Cohen

Order and judgment (one paper), Supreme Court, New York County (Kirschenbaum, J.), entered May 12, 1976, is modified, on the law, without costs, to strike the decretal paragraph therein and to substitute the following decretal paragraph:

> "ORDERED AND ADJUDGED, that the application be granted to the extent of directing respondents to pay petitioner back pay, inclusive of contract raises and benefits which would have been received by petitioner during the period from August 30, 1971 to June 24, 1974, less uniform allowances, vacation pay and any monies earned by him during said period of time, and also less 30 days pay."

We agree with the factual recitation of the dissenting opinion and with all of its legal conclusions except that which would deny the petitioner recovery of compensation after his conviction on May 24, 1973. Agreeing especially that the petitioner has suffered a great injustice, we do not feel that the law requires the insufficient relief the dissent would accord him.

Conceding that *Matter of Obergfell* (239 N.Y. 48) and *Matter of Pauley v. Noeppel* (1 Misc. 2d 928), cited by the dissent, hold that conviction of a public officer vacates his office and that reversal of the conviction does not work an automatic reinstatement, we cannot so easily conclude therefrom that the city was without power to reimburse the petitioner the pay he would have received once the conviction was reversed. Neither *Obergfell* nor *Pauley* reaches the basic

question here — does the law deny the petitioner the compensation he would have received as a public officer from the date his office was vacated by reason of his conviction to the date of reinstatement after it was determined that his conviction was erroneous for a mistaken identification.

We have found no direct ruling on the point in this state. Other states have split on the question (see C.J.S., Officers, §86, sud. a; 106 A.L.R. 644). We find, however, that an analogy may be drawn from *Matter of Jerry v. Board of Education* (35 NY2d 534). There a school teacher was properly suspended from his position with the result that he neither held the position nor performed its duties. Yet, the court found that these were not reasons to prohibit his receiving compensation for the position because the statute authorizing the suspension was silent whether pay should continue or not (even though another subdivision provided for full recompense if the teacher were ultimately acquitted of the charges). More recently the court permitted suspension without pay but only because in that instance the statute specifically forbade pay (*Matter of Meliti v. Nyquist*, 41 NY3d 183).

Public Officers Law, §30, sub. 1(e), requiring vacation of an office upon conviction is silent whether an officer whose position is so vacated should be paid should his conviction be reversed and the charge dismissed. The court stated in *Jerry*, "Compensation is a matter of such substantive right on the part of the teacher that we conclude that it cannot be taken away from him except pursuant to explicit statutory authorization." If true there, how much truer here where the petitioner has been trapped by a miscarriage of justice.

All concur, except Stevens, P.J., and Silverman, J., who dissent in part in the following memorandum by Silverman, J.:

STEVENS, P.J. and SILVERMAN, J. (Dissent in part in memorandum by SILVERMAN J.)

We differ from the majority only in that we would not allow petitioner any back pay for the period after May 24, 1973, the date of his felony conviction.

On August 30, 1971, petitioner, a correction officer of the City of New York, was arrested and charged with burglary and related crimes. He was immediately suspended by the Corrections Department without pay, pending the disposition of the criminal charges. No departmental disciplinary charges were ever served upon him. On March 23, 1973, he was found guilty of the charges, and on May 24, 1973, he was sentenced to a term of imprisonment. The Corrections Department thereafter informed petitioner that upon his conviction of a felony, his position as a correction officer was vacated pursuant to Public Officers Law §30 sub. 1(e). Petitioner remained on bail pending his appeal. On May 20, 1974, the Appellate Division, Second Department, unanimously reversed the conviction and dismissed the indictment, in essence holding that the identification was mistaken. *People v. Toro,* 44 A.D. 2d 848 (2d Dep't 1974). On June 24, 1974, the Corrections Department, without request, reinstated petitioner to his position as a correction officer. On May 1, 1975, respondent informed petitioner that he was not entitled to back pay. Petitioner commenced an Article 78 proceeding on May 8, 1975, which was dismissed on July 18, 1975, for failure to file the requisite Notice of Claim. He filed such a Notice of Claim and thereafter commenced this Article 78 proceeding on October 1, 1975. Special Term granted judgment in favor of petitioner for back pay for the entire period from the date of his original suspension. We would modify to exclude from the back pay recovery the period after petitioner's sentence on the felony conviction plus 30 days. Obviously, petitioner has suffered a great injustice. However, with respect to the period following his conviction, the controlling authority is that on conviction of a felony — rightly or wrongly — a public office is vacated under the provisions of Public Officers Law §30 subd. 1(e). *In Matter of Obergfell,* 239 N.Y. 48, 50 (1924), the Court of Appeals said:

> "The abridgment of the term upon the conviction of the incumbent is not a punishment for his offense. ...It is an automatic limitation upon the duration of his office. ...The application of the statute is not defeated by the possibility that the judgment may be reversed."

This is an "abridgment" of the term of office. Even a reversal of the conviction does not work an automatic reinstatement. *Matter of Pauley v. Noeppel,* 1 Misc. 2d 928, 931 (Sup. Ct., Erie Co. 1953). Thus, from the time of his conviction of the felony until his reinstatement following reversal, petitioner was not a correction officer and the City was without power to pay him, or to permit him to render services as a correction officer. His office was vacated by operation of law.

Civil Service Law §75 subd. 3 authorizes suspension of an employee without pay for a period not exceeding 30 days. We think the Corrections Department had the right, and perhaps the duty, upon the arrest, to suspend petitioner for 30 days. Accordingly, petitioner is not entitled to pay for the first 30 days of his suspension. Beyond that, however, the City had no right to continue the suspension without pay, at least in the absence of a showing of either waiver or some responsibility by petitioner for the delay. *Lytle v. Christian,* 47 A.D. 2d 824 (1st Dep't 1975). There was no such showing.

Petitioner's claim for back pay was rejected by a letter of May 1, 1975. The four-month period of limitations prescribed by CPLR §217 was extended by the provisions of CPLR §205 (a) and, accordingly, the petition was timely.

Order filed.

State of New York
Court of Appeals

---

1 No. 49

In the Matter of
Peter Toro,

Respondent,

vs.

Benjamin J. Malcolm, as Commissioner of the Department of Correction of the City of New York, et al.,

Appellants.

OPINION
This opinion is uncorrected and subject to revision before publication in the New York Reports.

(49) Allen G. Schwartz, NY City Corporation Counsel
Irving Cohen, L. Kevin Sheridan & Leonard Koerner
(of counsel) for appellants.
Robert Rivers, Hempstead, for respondent.

JASEN, J.:

The issue posed on this appeal is whether a public officer whose felony conviction is reversed on appeal is entitled to an award of backpay from the date of his conviction to the date of his voluntary reinstatement.

Respondent, Peter Toro, was appointed on September 8, 1969 as a Correction Officer of the New York City Correction Department. On August 30, 1971, respondent was arrested and charged with burglary, petit larceny, and impersonating a police officer. After a jury trial, he was convicted of these charges and was sentenced to a maximum term of four years imprisonment. On October 4, 1973, respondent was notified that, pursuant to section 30 of the Public Officers Law, his office was vacated effective May 24, 1973 — the date of his conviction and sentencing for the felony of burglary in the third degree.

Upon appeal, the Appellate Division reversed respondent's conviction and dismissed the indictment. The court concluded

that the complainant's eyewitness identification of respondent was tainted and should have been suppressed. Absent this identification, noted the court, the People's case rested on the uncorroborated testimony of a self-confessed participant. Additionally, the court believed that respondent's testimony concerning his whereabouts on the day of the crime raised a reasonable doubt as to his guilt. It was the interaction of these factors which led the Appellate Division to reverse respondent's conviction and dismiss the indictment.

After the Department of Correction voluntarily reinstated the petitioner as a Correction Officer, he commenced an Article 78 proceeding to recover backpay for the interim between his suspension and reinstatement. Special Term awarded respondent backpay from the date of his suspension to the date of his reinstatement. The Appellate Division, with two justices dissenting in part, modified the order and judgment of Special Term by excluding from the award 30 days' pay. (See Civil Service Law, §75.) The dissenters would also have excluded from the award backpay for the period between respondent's conviction and his voluntary reinstatement.

We hold that a public officer whose felony conviction is reversed on appeal and who is voluntarily reinstated is not entitled to recover backpay for the period between his conviction and voluntary reinstatement.

The directive contained in section 30 of the Public Officers Law is clear and unqualified: every public office becomes *vacant* upon the officer's conviction of a felony. A conviction of the incumbent constitutes an abridgement of the office, automatically terminating its duration. *(Matter of Obergfell,* 239 NY 48, 50; *Breslin v Leary,* 35 AD2d 794, 795; see generally, 3 McQuillin, Municipal Corporations, pp 432-433.) It follows that once an office becomes vacant, the contingency of reversal of the judgment of conviction does not defeat the operation of this statutory directive. *(Matter of Obergfell, supra;* Ann, Officers — Conviction of Crime, 71ALR2d 593, 600.) Nor does the actual reversal of the judgment of conviction require the reinstatement of the former officer

(Breslin v Leary, 35 AD2d, at p 795, *supra; Matter of Smith v Noeppel,* 204 M 49, 51; *Matter of Pauley v Noeppel,* 1 M2d 928, 931; *Matter of Tourjie v Noeppel,* 120 NYS2d 478, 482), and the award of backpay for the intervening period *(Breslin v Leary,* 35 AD2d 794, *supra*; 15 Op. State Compt. 437 [1959]).

As a matter of policy, the Legislature did not choose to provide merely for suspension from office upon an officer's conviction of a felony, but chose instead to declare the office vacant upon conviction. Hence, during the hiatus between petitioner's vacatur of office and voluntary reinstatement, he was not a Correction Officer, nor did he render services as a Correction Officer. Absent his continued status as a Correction Officer, no statutory authority exists for the payment of petitioner's salary, or to permit him to render services as a Correction Officer. (See *Matter of Davis v Impelliteri,* 197 M 162, 164).

The automatic termination of a public office upon the officer's conviction of a felony is not a punishment meted out in consequence of the conviction. (Ann, Officers - Conviction of Crime, 71 ALR2d, at p 600, *supra).* But rather, it is a legislative decision borne of the recognition that a public officer's conviction of a felony does not permit the cessation of governmental functions for the period required to exhaust the appellate process. Continued performance of governmental functions necessitates the existence of a point in time at which the affected office may be filled without concern for the possibility that at some future date a former officer's conviction may be reversed. Certainly, a government agency should not be faced with the possible dilemma of having two officers for the same position.

Admittedly, a situation, and perhaps this case may be construed as one, may arise in which an innocent officer is unjustly convicted of a felony, necessitating a reversal of the conviction on appeal. In that event, the unfortunate officer's loss of public office and its accompanying financial renumeration would, of course, be tragic. But such a hard case should not lead us to make bad law. To adopt a general rule, as the dissenters propose, that public officers whose convictions

have been reversed be automatically reinstated to their former office and awarded backpay, would apply to all public officers whose convictions were reversed regardless of the basis for the reversal. For example, notwithstanding conclusive evidence of guilt — a voluntary admission or confession — a conviction may be reversed on the ground of double jeopardy or that the applicable statute of limitations has run. Similarly, convictions may be reversed where evidence sufficient to establish guilt indisputably exists, but because of certain police or prosecutorial irregularities or violations of law, the evidence must be suppressed. Also possible is the reversal of a conviction solely because of the absence of a transcript deemed necessary to demonstrate the existence of appealable issues. (See, e.g., *People v Rivera*, 39 NY2d 519).

While we are sympathetic to the plight of a truly innocent officer unjustly accused and convicted, we are opposed to establishing a general rule which would provide unjustified relief to others not equally deserving.

To urge that a public officer whose conviction is reversed on appeal on a legal technicality, and who is automatically reinstated and awarded backpay, may nevertheless be discharged for misconduct pursuant to a disciplinary proceeding misses the point. The fact that the reinstated officer may be ultimately discharged would have no effect on his right to receive backpay. Pursuant to section 75 of the Civil Service Law, an officer found guilty of misconduct and discharged is entitled to receive his salary from the date of suspension to discharge, less 30 days' pay. (See, e.g., *Matter of Mason v Perotta*, 41 AD2d 916.) Thus, notwithstanding an eventual finding of misconduct, the officer would be entitled to receive backpay for a period which would include the interim between the date of conviction and the date of discharge. Where a conviction is reversed for a legal technicality in no way indicative of innocence, the public should not be required to continue to pay the officer's salary until its interest is ultimately vindicated.

In weighing the interest of a public officer convicted of a felony, whether justly or unjustly, against that of the public,

the balance must be struck in favor of the public's right to rest assured that its officers are individuals of moral integrity in whom they may, without second thought, place their confidence and trust. (See *Matter of Pauley v Noeppel*, 1 M2d, at p 931, *supra;* 30 Colum. L Rev 1045, 1050.) A felony conviction, notwithstanding its reversal on appeal, may in many cases shatter this ideal. To avoid this occurrence, we believe the Legislature has chosen to vacate a public office upon the officer's conviction of a felony. More than fifty years ago we so held in *Matter of Obergfell (supra)* and the Legislature has not changed or amended the substance of section 30 since our decision. In the face of this clear statutory directive, the courts lack the power to order the reinstatement of a former officer or an award of backpay based upon the subsequent reversal of the officer's conviction.

In a similar vein, an attorney, as an officer of the court, who is convicted of a felony is *ipso facto* disbarred. *(Matter of Mitchell*, 40 NY2d 153, 156; *Matter of Barash*, 20 NY2d 154, 157; *Matter of Ginsberg*, 1 NY2d 144, 147.) Reversal of the conviction does not automatically restore the attorney to the Bar. *(Matter of Ginsberg, supra.)* To attain this relief, the attorney must make a motion for reinstatement. *(Matter of Barash*, 20 NY2d, at p 158, *supra.)* In deciding whether to grant a motion to reinstate, the Appellate Division has discretion under section 90 of the Judiciary Law "to take a realistic view of all the circumstances in the case in order to prevent injury to clients or to the public." *(Id*, at p 159). To this extent, an attorney's restoration to the Bar cannot be said to be automatic. Nor if and when granted is such restoration retroactive — there remains the period of disbarment from the date of the conviction to the date of restoration.

Moreover, unlike the power exercised by the Appellate Division in determining whether a disbarred attorney should be restored to the Bar, it is not the courts which possess the discretion to reinstate a public officer whose felony conviction has been reversed on appeal. That decision, as in the case of an initial appointment to public office, lies in the discretion of the governmental agency in which the officer was employed. *(Matter of Pauley v Noeppel*, 1 M2d, at p 932.)

For the reasons stated, the certified question is answered in the negative and the order of the Appellate Division modified, with costs, to provide that petitioner is not entitled to backpay for the period after May 24, 1973, the date his office as a Correction Officer became vacant.

FUCHSBERG, J. (dissenting):

A matter of great public interest indeed is involved in this case. It is that a statute not be unnecessarily interpreted in a manner resulting in the unconscionable treatment of members of the public.

Peter Toro, a New York City Corrections Officer who enjoyed a blameless prior record, was suspended as the immediate result of criminal charges brought against him on the basis of an incident unrelated to his employment. After a flawed trial produced a conviction, the Appellate Division, Second Department, in an opinion in which it minced no words, found that Toro's arrest had been the result of an erroneous identification which had led to a complete miscarriage of justice. Under no circumstances does the language of that court justify the characterization of the basis for the petitioner's vindication as a "legal technicality", whatever place such a term may possibly have in some other jurisprudential context. Accordingly it dismissed the charges *on the merits* both on the facts and on the law *(People v Toro,* 44 AD2d 848).

The Department of Corrections, acting *sua sponte,* thereupon promptly ordered Toro's unconditional reinstatement. Toro made application for payment of the wages of which he had been deprived during his suspension. After delaying for a year, during which his departmental superiors supported his right to be paid, the City rejected his demand. This article 78 proceeding followed.

The Supreme Court Justice who heard the case at Special Term awarded judgment directing payment of all wages which Toro would have received between the date when he was suspended and the date when he was reinstated, inclusive of

contract raises which became effective in the interim, but less uniform allowances, vacation pay and any monies he had earned during that period. The Appellate Division, First Department, by a divided court, upheld that decision, except to the extent of disallowing payment for the first thirty days of the suspension.[1] Notedly, the two dissenters differed from the majority only in that they would have limited the back pay to the period preceding the date of conviction at trial; all five Justices agreed on the injustice suffered by the petitioner, the majority terming it "grave", the dissenters "great".

On this appeal to us, the issue is whether a civil servant who ultimately is found innocent of any criminal culpability whatsoever is within the embrace of Section 30 (subd. 1, par 9e]) of the Public Officers Law, which provides that every office becomes "vacant upon ... [the] conviction [of the incumbent thereof] of a felony, or crime involving a violation of his oath of office". Is it not a fundamental precept of justice that, once it is finally decided that an accused has been falsely charged and, on this basis, has been proved guiltless, he is, so far as reasonably possible, to be treated as though he had never been accused at all?

The question answers itself. It does not do so for the first time here. Legal philosophers have long wrestled, not with whether the wrong should be righted, but how best to do so (see, Nixon, Voltaire and the Calas Case [1962], p. 198; Borchard, Convicting the Innocent: Errors in Criminal Justice [1932] p. 37).

The salutary effect on public confidence in government that flows from realization of the natural societal urge to return a falsely accused individual to his or her *status quo ante* is not to be underestimated. The moral values so endorsed far outweigh

---

[1]. The Appellate Division believed Section 75 (subd. 3) of the Civil Service Law required the modification. Since Toro has not cross-appealed, it is unncessary to reach the merits of that question (see *Little Joseph Realty Inc. v Town of Babylon,* 41 NY2d 738, 746; *People v Consolidated Edison Co.,* 34 NY 2d 646, 648; *Rye v Pub. Serv. Mut. Ins. Co.,* 34 NY2d 470, 474).

the alarums sounded by the majority. So far as any dislocation of personnel is concerned, it would hardly call for much administrative ingenuity to arrange that appointment to a post vacated by an occupant whose case is still in the appellate process be conditioned on the possibility of a reversal. In Toro's case the reality not only is that his position remained available but that, having been vindicated on the merits, he was welcomed back with open arms. Certainly, in any event, "the prospect of financial impact" should not "dictate the outcome" *(Brooklyn Union Gas Co. v Human Rights Appeal Board,* 41 NY2d, 84, 90).

Significantly, Public Officers Law, section 30, itself provides no specific guidance with regard to suspended wages in circumstances where a conviction has been rendered nugatory by a superseding determination that it was totally unfounded. The statute's complete silence on the subject makes it difficult to imply an undeserved forfeiture.

It is familiar doctrine that a statute imposing a penalty or forfeiture is to be strictly construed *(Osborne v Nat'l Ry. Co.,* 226 NY 421, 416; McKinney's Statutes § § 271, 273; 82 C.J.S., Statutes, § 389). Unless plain and unequivocal language so requires, "a penalty cannot be raised by implication, but must be expressly created and imposed" *(Health Dept. v Knoll,* 70 NY 530, 536; see also, *United States v Weitzel* 246 U.S. 533, 543 [Brandeis, J.]; *Verona Cheese Co. v Murtaugh,* 50 NY 314, 317). This principle of sound statutory construction especially interdicts an interpretation of section 30 which unncessarily would run counter to the quest for fundamental fairness to persons who ultimately are found to have been entirely innocent of any wrongdoing. An opposite view would literally add injury to insult.

Matter of Obergfell (239 NY 48, 50), relied on by the majority, does not require a contrary result. That case arose in a much different matrix. The petitioner there was an elected official. A mayor who had obtained a stay pending the appeal of his criminal conviction, he sought an order directing the board of elections to disregard the city clerk's certification that

his office was vacant. At the time the Court affirmed the denial of the application, the conviction was still in full force and effect and there was therefore at most a "possibility" that it eventually might be reversed. Thus, the decision in *Obergfell* represents only an application of the rule that the term "conviction", as used in statutes providing for disabilities, disqualifications, or forfeitures, should be construed to mean an undisturbed judicial finding of guilt (see, e.g., *Matter of Mitchell,* 40 NY2d 153; *Matter of Robinson v Bd. of Regents,* 4 A.D. 2d 359, mot. lv. app. den. 3 NY2d 708; cf *Matter of Keogh v Wagner,* 20 A.D.2d 380, 384-385, affd. 15 NY2d 569). It did not determine the issue before us, i.e., the effect of an unmistakable and unqualified final exoneration.[2]

For these reasons, the certified question should be answered in the affirmative and the order affirmed.

---

[2]. *Matter of Pauley v. Noeppel,* (1 Misc. 2d 928, *Matter of Smith v. Noeppel* (240 Misc. 49), *Matter of Tourjie v Noeppel,* (120 NYS 2d 478 [n.o.r.]) and 1959 Opn. State Comp. 437, all cited by the majority, are premised on a far broader reading of *Obergfell* than that decision warranted. Compare *Matter of Learman v. Roche* (176 Misc. 980).

* *

Order modified, with costs, in accordance with the opinion herein and, as so modified, affirmed. Question certified answered in the negative. Opinion by Jasen, J. All concur except Fuchsberg, J., who dissents in part and votes to affirm in an opinion in which Wachtler, J., concurs.

Decided March 29, 1978